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State v. Alvarez Appellant's Brief Dckt. 43094

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 43094
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR 2013-8483
v.)	
)	
ANDRES ALVAREZ,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	

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BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA

HONORABLE PATRICK H. OWEN
District Judge

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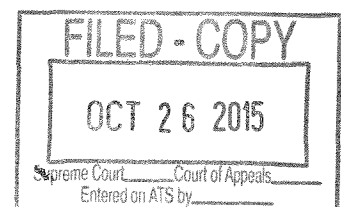




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STATEMENT OF THE CASE

Nature of the Case

Andres Alvarez appeals following the district court's revocation of his probation and the district court's denial of his motion for credit for time served. On appeal, Mr. Alvarez asserts that the district court erred when it calculated his credit for time served. The 2015 amendments to the credit statutes, which are retroactive, require the district court to give Mr. Alvarez credit for all the time served as a condition of his probation. Mr. Alvarez also asserts that the district court erred in revoking his probation.

Statement of the Facts & Course of Proceedings

On April 13, 2013, Correctional Officer Kelly Hodge was picking up food trays in the segregation unit at the Idaho Correctional Center. (Presentence Investigation Report (*hereinafter*, PSI),¹ p.3.) According to Officer Hodge, Mr. Alvarez threw his food tray out through the food port, hitting him in the knee. (PSI, p.3.) This did not cause any long term injuries. (PSI, p.3.)

Mr. Alvarez was charged with battery on a correctional officer. (R., p.42.) He was found guilty following a jury trial. (R., p.110.) The district court imposed a unified sentence of three years, with six months fixed, and the court suspended the sentence and placed Mr. Alvarez on probation. (R., p.137.) Mr. Alvarez appealed, asserting that the district court abused its discretion by imposing an excessive underlying sentence. (R., p.146.) In an unpublished opinion, the Idaho Court of Appeals affirmed Mr. Alvarez's sentence. *State v. Alvarez*, 2015 Opinion No. 397 (Ct. App. March 6, 2015) (unpublished).

¹ The designation "PSI" shall refer to the electronic file created in Idaho Supreme Court case number 41986, containing the PSI and all attachments.

Over eight months later, the State filed a report of probation violation which alleged that Mr. Alvarez violated his probation by failing to attend treatment, failing to report that he was fired from his job, twice failing to report to his probation officer, changing residence without permission, and failing to pay fines, fees or costs. (Supp. R., pp.9-18.) The State filed an amended report six months later which alleged that Mr. Alvarez also violated his probation by being charged with two counts of misdemeanor battery. (Supp. R., pp.21-40.)

Mr. Alvarez admitted to violating some of the terms and conditions of his probation, and the district court revoked his probation. (Supp. R., pp.53-57.) The district court calculated Mr. Alvarez's credit for time served as 184 days. (Supp. R., pp.55-56.) Mr. Alvarez filed a timely notice of appeal. (Supp. R., pp.58-60.)

On May 26, 2015, Mr. Alvarez filed a Motion for Credit for Time Served and supporting affidavit in which he asserted that he should have received credit for all of the time he served in conjunction with the charge and the resulting sentence imposed by the Court. (Supp. R., pp.63-67.)

On July 2, 2015, the district court denied Mr. Alvarez's motion without a hearing. (Order Denying Motion for Credit for Time Served, pp.1-5, attached to the Motion to Augment filed on October 26, 2015.) The district court found that Mr. Alvarez was ordered to serve 60 days as a condition of probation, but was not entitled to credit for this time. (Order Denying Motion for Credit for Time Served, p.4, attached to the Motion to Augment filed on October 23, 2015.) However, the district court did adjust Mr. Alvarez's credit calculation for a total time credited of 226 days. (Order Denying Motion for Credit for Time Served, p.4, attached to the Motion to Augment filed on October 23, 2015.) The district court likewise adjusted the credit calculation to reflect

credit for 226 days in a corrected order revoking probation, filed on July 1, 2015.
(Corrected Order Revoking Probation, Imposing Sentence and Commitment, attached
to the Motion to Augment filed on October 23, 2015.)

ISSUES

1. Did the district court err when it denied Mr. Alvarez credit for time he served as a condition of probation?
2. Did the district court err in revoking Mr. Alvarez's probation?

ARGUMENT

I.

The District Court Erred When It Denied Mr. Alvarez Credit For Time He Served As A Condition Of Probation

A. Introduction

Mr. Alvarez asserts that the district court erred when it denied him credit for time he served as a condition of probation. Mr. Alvarez filed a *pro se* Motion for Credit for Time Served and supporting affidavit in which he asserted that he should have received credit for all of the time he served in conjunction with the charge and the resulting sentence imposed by the Court. (Supp. R., pp.63-67.) The district court denied the motion in part and granted the motion in part on July 2, 2015. (Order Denying Motion for Credit for Time Served, attached to Motion to Augment, p.1, filed October 23, 2015.) The district court acknowledged that the law governing credit for time served as a condition of probation had been amended and noted that Mr. Alvarez had served 60 days as a condition of probation, but refused to credit Mr. Alvarez for the time. (Order Denying Motion for Credit for Time Served, attached to Motion to Augment, pp.3-4, filed October 23, 2015.) Although the district court also issued a corrected order revoking probation which gave Mr. Alvarez credit for 226 days served, the district court's award of credit specifically excepted from its re-calculation the days Mr. Alvarez served as a condition of probation. (Corrected Order Revoking Probation, Imposing Sentence and Commitment, p.3, attached to the Motion to Augment filed on October 23, 2015.) Mr. Alvarez respectfully requests that this Court vacate and remand this case with instructions that Mr. Alvarez be given credit for time served for the 60 days he served as a condition of probation.

B. Standard Of Review

A determination as to “[w]hether the district court properly applied the law governing credit for time served is a question of law over which” appellate courts exercise free review. *State v. Covert*, 143 Idaho 169, 170 (Ct. App. 2006). On appeal, the appellate court will “defer to the district court’s findings of fact, however, unless those findings are unsupported by substantial and competent evidence in the record and are therefore clearly erroneous.” *Id.* An appellate court exercises free review over questions of law. *State v. O’Neill*, 118 Idaho 244, 245 (1990).

C. The District Court Erred When It Denied Mr. Alvarez’s Request For Credit For Time He Served As A Condition Of Probation

Mr. Alvarez asserts that the 2015 amendments to the credit statutes require the district court to give him credit for all the time served as a condition of probation, and the district court erred in denying his motion for credit for time served and in refusing to award him credit for time spent on probation.² The Amendments to the two relevant statutes took effect on July 1, 2015. Where the district court issued a corrected order revoking probation on July 1, 2015, and issued its order denying Mr. Alvarez’s motion for credit for time served on July 2, 2015, the statutory language in effect at the time the district court calculated the time Mr. Alvarez had served required the district court to credit Mr. Alvarez with time served as a condition of probation.

Idaho Code Sections 18–309 and 19-2603 govern, *inter alia*, credit for incarceration ordered as a condition of probation.

As amended, I.C. § 18-309(2) provides:

² Because a motion requesting credit for time served may be brought “at any time” pursuant to I.C.R. 35(c), credit for time served can be calculated or re-calculated at any time. I.C.R. 35(c).

In computing the term of imprisonment when judgment has been withheld and is later entered or sentence has been suspended and is later imposed, the person against whom the judgment is entered or imposed shall receive credit in the judgment for any period of incarceration served as a condition of probation under the original withheld or suspended judgment.

I.C. § 19-2603, as amended, similarly provides:

When the court finds that the defendant has violated the terms and conditions of probation, it may, if judgment has been withheld, pronounce any judgment which it could originally have pronounced, or, if judgment was originally pronounced but suspended, revoke probation. The time such person shall have been at large under such suspended sentence shall not be counted as a part of the term of his sentence. The defendant shall receive credit for time served from the date of service of a bench warrant issued by the court after a finding of probable cause to believe the defendant has violated a condition of probation, for any time served following an arrest of the defendant pursuant to section 20-227, Idaho Code, and for any time served as a condition of probation under the withheld judgment or suspended sentence.

The amendments to both of the credit statutes became effective on July 1, 2015. See 2015 Idaho Sess. Laws, Ch. 99 (H.B. 64). Because the effective date of the amendments was on or before the date the district court's orders calculating credit for time served were filed, the district court erred in refusing to give Mr. Alvarez credit for time served as a condition of probation.

1. The Plain Language Of The 2015 Amendments Requires The District Court To Calculate Credit Pursuant To The Amendments That Were Effective At The Time Credit Was Calculated

Mr. Alvarez asserts that this Court should hold he is entitled to credit for all of the time spent in custody as a condition of probation. This matter is pending from a timely appeal from the order revoking his probation, and, during the pendency of his direct appeal, the district court filed documents calculating his credit for time served. At the time the district court entered its orders calculating Mr. Alvarez's credit for time served, the 2015 amendments to the credit statutes were in effect.

The plain language of the 2015 statutory amendments requires the district court to calculate credit pursuant to the amendments if they were effective at the time the court calculates time served. Specifically, I.C. § 18-309(2) provides, in relevant part: “in computing the term of imprisonment when . . . sentence has been suspended and is later imposed, the person. . . shall receive credit in the judgment for any period of incarceration served as a condition of probation under the original . . . suspended judgment.” I.C. § 18-309(2). Under the plain language of the amendment, the statute applies after the sentence which was suspended is later imposed. Similarly, I.C. § 19-2603 now provides, in relevant part: “When the court finds that the defendant has violated the terms and conditions of probation, it may . . . revoke probation. The defendant shall receive credit for time served . . . for any time served as a condition of probation under the . . . suspended sentence.” I.C. § 19-2603. Again, the contemplated time for the awarding of credit is after the district court revokes probation. Thus, the amendments clearly provide that they apply to calculations of time served made after the amendments were effective, and no further analysis regarding retroactivity is necessary.

Because the effective date of the amendments was on or before the date the district court’s orders calculating credit for time served were filed, the district court erred in refusing to give Mr. Alvarez credit for time served as a condition of probation.

2. Alternatively, Should This Court Find That The Time Calculation Must Be Analyzed From The Dates Mr. Alvarez Actually Was Incarcerated As A Condition Of Probation, The 2015 Amendments To The Credit Statutes Apply Retroactively

Should this Court require the time calculation occur during the period of time Mr. Alvarez was incarcerated as a term of his probation, Mr. Alvarez asserts that the

2015 amendments to the credit statutes are retroactive and require the district court to give him credit for all the time served as a condition of probation.

The amendments to the credit statutes mandating that a defendant receive credit for time spent incarcerated as a condition of his probation became effective on July 1, 2015. See 2015 Idaho Sess. Laws, Ch. 99 (H.B. 64). Should this Court find the relevant inquiry is whether the time for credit to be determined is when Mr. Alvarez actually served the time as a condition of probation, this Court must then determine whether the amendments are retroactive. The 2015 amendments are retroactive, thus Mr. Alvarez is entitled to credit for those days he spent incarcerated as a condition of his probation.

The plain language of the 2015 amendments to the credit statutes expressly declares the intent for those amendments to be retroactive. Section 18-309(2) provides that a defendant “shall receive credit in the judgment for any period of incarceration served as a condition of probation under the original withheld or suspended judgment.” Section 19-2603 similarly provides that a defendant “shall receive credit . . . for any time served as a condition of probation under the withheld judgment or suspended sentence.”

The interpretation of a statute is a question of law, over which appellate courts exercise free review. *State v. Hart*, 135 Idaho 827, 829 (2001). The Idaho Supreme Court has outlined the following rules of statutory interpretation. “The interpretation of a statute must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole.” *Verska v. Saint Alphonsus Reg’l Med. Ctr.*, 151 Idaho 889, 893 (2011) (internal quotation marks omitted). “A statute is ambiguous where the language is capable of

more than one reasonable construction. An unambiguous statute would have only one reasonable interpretation.” *Verska*, 151 Idaho at 896 (citation and internal quotation marks omitted). “If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written.” *Id.* (internal quotation marks omitted). “We have consistently held that where statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature.” *Id.* (internal quotation marks omitted). “The asserted purpose for enacting the legislation cannot modify its plain meaning.” *Id.* (internal quotation marks omitted). Appellate courts do not have authority to revise or void “an unambiguous statute on the ground that it is patently absurd or would produce absurd results when construed as written.” *Id.* at 896. “If the statute as written is socially or otherwise unsound, the power to correct it is legislative, not judicial.” *Id.* at 893 (internal quotation marks omitted).

“In general, legislation acts prospectively.” *Guzman v. Piercy*, 155 Idaho 928, 937 (2014). However, there are some cases where a new piece of legislation or an amendment to an existing statute will be retroactive in effect. See, e.g., *id.* at 938 (holding that an amendment to an existing statute had retroactive effect). As the Idaho Supreme Court has explained, “a statute should be applied retroactively only if the legislature has clearly expressed that intent or such intent is clearly implied by the language of the statute.” *Id.* (quoting *Kent v. Idaho Pub. Utils. Comm’n*, 93 Idaho 618, 621 (1970)); cf. *Verska*, 151 Idaho at 893 (holding that courts are to give effect to the plain language of the statute when the statute is unambiguous).

For example, the *Guzman* Court explained, “if the language clearly refers to the past as well as the future, then the intent to make the law retroactive is expressly

declared within the meaning of [the statute].” *Guzman*, 155 Idaho at 938 (quoting *Peavy v. McCombs*, 26 Idaho 143, 151 (1914)) (bracketed text amended). As such, an amendment to a statute which provided, “[w]henever any ... herd district ... has heretofore been, or shall hereafter be, declared to be created ... by an order,” “[n]o challenge to ... such an order, shall be heard or considered after seven (7) years has lapsed from the date of the order,” clearly expressed the legislative intent for that amendment to be retroactive in scope. *Guzman*, 155 Idaho at 938 (quoting I.C. § 31-857) (ellipses from original). The reason was “[t]his language referencing ‘any’ order that ‘has heretofore been, or shall hereafter be’” referred to both past and future events, thus making that portion of the statute retroactive. See *id.* (emphasis added).

Similarly, the Idaho Supreme Court held that statutory language providing: “[T]he administration of all rights to the use of ground water, whenever or however acquired or to be acquired, shall, unless specifically excepted therefrom, be governed by the provisions of this act,” made the statute retroactive in scope “by the express language in [that section] of the original act.” *A & B Irrigation Dist. v. Idaho Dep’t of Water Res.*, 153 Idaho 500, 508 (2012) (quoting 1951 Idaho Sess. Laws, Ch. 200). As in *Guzman*, it was the inclusion of “all rights . . . whenever or however acquired or to be acquired,” thus referring to past and future events, which demonstrated the intent for the statute to be retroactive. See *id.* (emphasis added).

The Idaho Supreme Court has also applied this rule to statutory amendments which alter the consequences of a criminal conviction. See *State v. Forbes*, 152 Idaho 849, 851 (2012) (considering whether an amendment to the sex offender registration act was retroactive). In *Forbes*, the Court determined the statutory amendment had retroactive effect because “the Legislature, by implication, intended the amendment to

apply to offenders who have already been granted a withheld judgment.” *Id.* (citing *State v. Hardwick*, 150 Idaho 580, 581-82 (2011)). Specifically, the amendment provided, in relevant part: “A judgment of conviction for a violation of any offense requiring sex offender registration as set forth in section 18-8304, Idaho Code, shall not be subject to dismissal or reduction under this section.” *Id.* (quoting 2006 Idaho Sess. Laws, Ch. 157). As in *Guzman* and *A & B Irrigation District*, it was the language “for any offense” which expressly declared the intent for that amendment to be retroactive.³ See *id.* (emphasis added); *cf. Tugade v. Hoy*, 265 F.2d 63, 65 (9th Cir. 1959) (per curiam) (holding “[t]he statute, § 241(a)(11) as amended, 70 Stat. 575 (1956), by its terms is specifically made retroactive to one ‘who at any time has been convicted of . . . any law . . . relating to the illicit possession of . . . narcotic drugs’”) (alterations in original) (emphasis added).

Like the statutory amendment at issue in *Forbes*, as well as the statutes at issue in *Guzman* and *A & B Irrigation District*, the language of the 2015 amendments to the credit statutes expresses a clear intent for those amendments to be retroactive in scope:

In computing the term of imprisonment when judgment has been withheld and is later entered or sentence has been suspended and is later imposed, the person against whom the judgment is entered or imposed shall receive credit in the judgment for any period of incarceration served as a condition of probation under the original withheld or suspended judgment.

. . .

The defendant shall receive credit for time served from the date of service of a bench warrant issued by the court after a finding of probable cause to believe the defendant has violated a condition of probation, for any time

³ That conclusion was bolstered by the fact that the Court had already determined this amendment did not violate the protections against *ex post facto* laws. See *Forbes*, 152 Idaho at 851-52 (citing *State v. Hardwick*, 150 Idaho 580, 581-82 (2011)).

served following an arrest of the defendant pursuant to section 20-227, Idaho Code, and for any time served as a condition of probation under the withheld judgment or suspended sentence.

2015 Idaho Sess. Laws, Ch. 99 (amending, respectively, I.C. §§ 18-309 and 19-2603) (emphasis added). Just “[a]s the GWA⁴] governs all water rights whenever acquired, [and] I.C. § 31-857 governs all herd district ordinances whenever enacted,” the amendments to I.C. §§ 18-309 and 19-2603 govern all periods of incarceration served as conditions of release on probation, whenever enforced. See *Guzman*, 155 Idaho at 938; cf. *Forbes*, 152 Idaho at 851 (holding the amendment to the sex offender registration act governs all judgments of conviction for sex offenses, whenever entered). Thus, by using the term “any,” thereby referring to past and future periods of incarceration served as a condition of release on probation, the language of the 2015 amendments to the credit statutes expressly declared that those amendments were retroactive in scope.

Because the Legislature made the amendments to the credit statutes retroactive in scope, they control in Mr. Alvarez’s case should this Court determine that the time for calculation is the time he actually was in custody as a condition of probation. Thus, the district court should have ordered that Mr. Alvarez receive credit for the 60 days he served as a condition of probation. Because the district court did not give Mr. Alvarez credit for all the time served as a condition of probation, it erred when it calculated his credit for time served.

Mr. Alvarez asserts that, because the facts in the record show that he is entitled to additional credit for time served for the time he was incarcerated as a condition of his

⁴ The Ground Water Act, which was at issue in *A & B Irr. Dist.*

probation, the district court erred when it denied him credit. This Court should hold that Mr. Alvarez is entitled to credit for all of the time spent in custody in his case.

II.

The District Court Abused Its Discretion When It Revoked Mr. Alvarez's Probation

Mr. Alvarez asserts that the district court abused its discretion when it revoked his probation and executed his original sentence of three years, with one-half year fixed. He asserts that the violations did not justify revoking probation, especially in light of the goals of rehabilitation and the fact that the protection of society could be best served by his continued supervision under the probation department.

There are generally two questions that must be answered by the district court in addressing allegations of probation violations: first, the court must determine whether the defendant actually violated the terms and conditions of his probation; and second, if a violation of probation has been found, the trial court must then decide the appropriate remedy for the violation. *State v. Sanchez*, 149 Idaho 102, 105 (2009). "The determination of whether a probation violation has been established is separate from the decision of what consequence, if any, to impose for the violation." *Id.* (quoting *State v. Thompson*, 140 Idaho 796, 799 (2004)). Once a probation violation has been found, the district court must determine whether it is of such seriousness as to warrant revoking probation. *State v. Chavez*, 134 Idaho 308, 312 (Ct. App. 2000). However, probation may not be revoked arbitrarily. *State v. Adams*, 115 Idaho 1053, 1055 (Ct. App. 1989). The district court must decide whether probation is achieving the goal of rehabilitation and whether probation is consistent with the protection of society. *State v. Leach*, 135 Idaho 525, 529 (Ct. App. 2001). If a knowing and intentional

probation violation has been proved, a district court's decision to revoke probation will be reviewed for an abuse of discretion. I.C. § 20-222; *Leach*, 135 Idaho at 529.

Only if the trial court determines that alternatives to imprisonment are not adequate in a particular situation to meet the state's legitimate interest in punishment, deterrence, or the protection of society, may the court imprison a probationer who has made sufficient, genuine efforts to obey the terms of the probation order. *State v. Lafferty*, 125 Idaho 378, 382 (Ct. App. 1994).

As to the first issue before the district court, Mr. Alvarez concedes that he violated conditions of his probation as he admitted that he had done so. (3/4/15 Tr., p.3, L.16 – p.5, L.14.) However, Mr. Alvarez asserts that the district court abused its discretion in finding that his probation violations justified revocation. Mr. Alvarez asserts that his continued probation would achieve the goals of his rehabilitation and the protection of society.

Although Mr. Alvarez's violations were serious, they did not justify revoking his probation. Mr. Alvarez admitted to violating the terms of his probation by failing to maintain full-time employment, failing to pay fines, fees, and costs, and failing to reimburse the county for the cost of the public defender. (3/4/15 Tr., p.3, L.16 – p.5, L.14.) However, Mr. Alvarez took accountability for his actions and admitted he violated his probation. (3/4/15 Tr., p.3, L.16 – p.5, L.14.)

Initially, Mr. Alvarez was doing well on probation—he was employed full-time, he was engaged in treatment and was making restitution payments. (Addendum to Presentence Investigation Report (*hereinafter*, APSI),⁵ pp.17-18.) However, in June of 2014, Mr. Alvarez became ill and he began having difficulty with his living situation

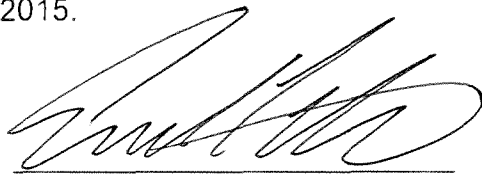
which resulted in his getting fired from his full-time employment. (APSI, pp.20-24.) After the probation violation was filed, Mr. Alvarez was charged with simple assault. (APSI, p.24.) Yet, Mr. Alvarez has turned a corner. He realizes he wants to be successful on probation by doing the work and remaining in the community. (3/25/15 Tr., p.12, L.10 – p.13, L.25.)

In light of all of the evidence that was presented to the district court, it abused its discretion when revoked Mr. Alvarez's probation.

CONCLUSION

Mr. Alvarez respectfully requests that this Court order that he be given credit for all time he was incarcerated on this case, including the time served as a condition of probation. Additionally, Mr. Alvarez asks this Court to place him back on probation.

DATED this 26th day of October, 2015.


foa SALLY J. COOLEY
Deputy State Appellate Public Defender

⁵ The designation APSI shall refer to the additional confidential sentencing materials in the electronic file prepared for Idaho Supreme Court case number 43094.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 26th day of October, 2015, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

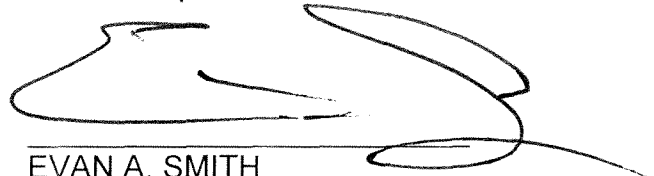
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PATRICK H OWEN
DISTRICT COURT JUDGE
E-MAILED BRIEF

DAVID LORELLO
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Hand delivered to Attorney General's mailbox at Supreme Court.

A handwritten signature in black ink, appearing to read 'Evan A. Smith', with a long horizontal line extending from the end of the signature.

EVAN A. SMITH
Administrative Assistant

SJC/eas